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Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF ON BEHALF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question, which bears on the first question presented in *Boumediene v. Bush*, No. 06-1185, and the second and fourth questions presented in *Al Odah v. United States*, No. 06-1186:

> Whether federal judicial review under the Detainee Treatment Act (DTA), Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 (2005), of a final decision by the Combatant Status Review Tribunal (CSRT) that an individual is properly detained by the government as an enemy combatant is an adequate substitute for the common law writ of habeas corpus, when the CSRT may have relied on statements extracted by torture or other impermissible coercion and the DTA does not appear to authorize the court to make factual determinations regarding such reliance in ruling on the legality of the detention.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal judges who dedicated their judicial careers to promoting the rule of law:

Hon. William G. Bassler (appointed to the United States District Court, District of New Jersey, by President George H.W. Bush; served 1991-2006);

Hon. Michael Burrage (appointed to the United States District Court, Western, Northern and Eastern Districts of Oklahoma, by President Clinton; 1994-2001);

Hon. Edward N. Cahn (appointed to the United States District Court, Eastern District of Pennsylvania, by President Ford; served 1974-1998);

Hon. Susan Getzendanner (appointed to the United States District Court, Northern District of Illinois, by President Carter; served 1980-1987);

Hon. Shirley Hufstedler (appointed to the United States Court of Appeals for the Ninth Circuit by President Johnson; served 1968-1979);

Hon. Nathaniel R. Jones (appointed to the United States Court of Appeals for the Sixth Circuit by President Carter; served 1979-2002);

Hon. Thomas D. Lambros (appointed to the United States District Court, Northern District of Ohio, by President Johnson; served 1967-1995);

Hon. Timothy K. Lewis (appointed to the United States District Court, Western District of Pennsylvania, by George H.W. Bush; served 1991-1992; appointed to the United States Court of Appeals for the Third Circuit by President George H.W. Bush; served 1992-1999);

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Hon. James K. Logan (appointed to the United States Court of Appeals for the Tenth Circuit by President Carter; served 1977-1998);

Hon. H. Curtis Meanor (appointed to the United States District Court, District of New Jersey, by President Nixon; served 1974-1983);

Hon. Abner Mikva (appointed to the United States Court of Appeals for the District of Columbia Circuit by President Carter; served 1979-1994);

Hon. William A. Norris (appointed to the United States Court of Appeals for the Ninth Circuit by President Carter; served 1980-1997);

Hon. Robert J. O'Conor, Jr. (appointed to the United States District Court, Southern District of Texas, by President Ford; served 1975-1984);

Hon. Stephen Orlofsky (appointed to the United States District Court, District of New Jersey, by President Clinton; served 1995-2003);

Hon. Raul A. Ramirez (appointed to the United States District Court, Eastern District of California, by President Carter; served 1980-1989);

Hon. Stanley J. Roszkowski (appointed to the United States District Court, Northern District of Illinois, by President Carter; served 1977-1998);

Hon. H. Lee Sarokin (appointed to the United States District Court, District of New Jersey, by President Carter; served 1979-1994; appointed to the United States Court of Appeals for the Third Circuit by President Clinton; served 1994-1996);

Hon. William S. Sessions (appointed to the United States District Court, Western District of Texas, by President Ford; served 1974-1987);

Hon. Patricia M. Wald (appointed to the United States Court of Appeals for the District of Columbia Circuit by President Carter; served 1979-1999);

Hon. Alfred M. Wolin (appointed to the United States District Court, District of New Jersey, by President Reagan; served 1987-2004).

These consolidated cases raise an issue that goes to the heart of the process of judging and poses a significant threat to the integrity of the federal judicial process.

The Detainee Treatment Act, Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 (2005), authorizes limited judicial review of an Executive Branch decision that an individual is properly detained by the government as an enemy combatant, but does not appear to authorize the court, when it rules on the legality of that detention, to determine whether statements upon which the detention is based were extracted by torture or other impermissible coercion. Such review cannot be considered an adequate substitute for the common law writ of habeas corpus.[2]

SUMMARY OF ARGUMENT

The English common law and our Nation's fundamental traditions condemn judicial reliance upon statements extracted by torture or other impermissible coercion. There are substantial allegations, however, that Combatant Status Review Tribunal (CSRT) panels have

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[2] The court of appeals denied, over dissent, leave to file a brief as *amici curiae* by several former federal judges (including some of the instant *amici*) on the ground that it was inappropriate for the proposed *amici* to describe themselves as "retired federal judges." C.A. Order (Dec. 29, 2006). This Court, however, has accepted for filing, and has relied upon, *amicus* briefs that have been submitted by former federal and state judges in other cases. *See, e.g.*, *Hamdan v. Rumsfeld*, 546 U.S. 1166 (2006) (mem.) ("The motion of former Federal Judges Shirley M. Hufstedler and William A. Norris for leave to file a brief as *amici curiae* [is] granted."); *Smith v. Robbins*, 528 U.S. 259, 282 n.13 (2000) (citing "Brief for Retired Justice Armand Arabian et al. as *Amici Curiae*").

relied on such statements to uphold the detention of individuals by the United States as enemy combatants. Those allegations cast a disturbing shadow over judicial review of the CSRT panel decisions. Unless the Detainee Treatment Act (DTA) authorizes the court to determine whether, and to what extent, an Executive detention is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of the detention, judicial review under the DTA cannot be an adequate substitute for the common law writ of habeas corpus.

A. Torture has been illegal under English common law for more than 350 years. Even the notorious Star Chamber used torture rarely, and its willingness to do so was one of the reasons that it was abolished.

Common law judges did not admit as evidence against a defendant statements that had been extracted by torture because they recognized that such evidence is inherently unreliable and that it degrades the dignity of humanity and justice when judges acquiesce in such cruelty. The applicable common law rules of evidence also excluded confessions that had been coerced through means less cruel than torture.

Our Nation's founders shared the common law's revulsion for torture and other impermissible coercion. The Fifth Amendment's protection against self-incrimination was enacted as a direct response to the historical experience of the Star Chamber and was intended to prohibit extreme methods of coercion, including torture, as well as judicial reliance on statements extracted by such methods. Additionally, the prohibitions against unreasonable searches and seizures and cruel and unusual punishments, and also the guarantee of due process, reflect the Founders' antipathy to government cruelty and undue coercion within the justice system.

Like the common law courts, our Founding Fathers viewed statements extracted by impermissible coercion also as unreliable. They also prohibited the government from relying on such tactics as a means to protect individual

liberty, to guard against tyranny, and to preserve the balance between the state and the individual that lies at the core of the American system of government.

B. The public record reveals that CSRT panels routinely made detention determinations without investigating torture allegations or excluding statements allegedly extracted through impermissible coercion, and the government maintains that the CSRT panels were authorized to rely on evidence extracted through such means. The CSRT panels typically proceeded as though it was not their role to assess whether statements offered as evidence were extracted by impermissible coercion. The information presented to the panels might also have been insufficient to enable them to determine the provenance or reliability of such statements.

C. The judicial review authorized under the DTA does not appear to allow the court, when it rules on the legality of the detention, to engage in the factfinding necessary to determine the extent to which the CSRT's detention decision relied on statements extracted by torture or other impermissible coercion. As such, the statute would force the federal judiciary to uphold Executive Branch detention of an individual even when that detention is based on evidence that has long been considered unreliable, inadmissible, and contrary to human dignity. Such review corrupts the judicial function, contravenes established common law and legal tradition, and is an inadequate substitute for the common law writ of habeas corpus.

ARGUMENT

THE DETAINEE TREATMENT ACT'S JUDICIAL REVIEW IS NOT AN ADEQUATE SUBSTITUTE FOR THE COMMON LAW WRIT OF HABEAS CORPUS BECAUSE IT APPEARS THAT THE COURT IS NOT AUTHORIZED TO DETERMINE THE EXTENT TO WHICH THE CSRT RELIED ON STATEMENTS EXTRACTED BY TORTURE, OR OTHER IMPERMISSIBLE COERCION, WHEN THE COURT RULES ON THE LEGALITY OF THE DETENTION

Although there are few absolutes in history, this much is clear: Reliance on statements extracted by torture or

other impermissible coercion is contrary to the clear condemnation of such conduct that existed at common law and that is woven into the fabric of our Nation's Constitution. A judicial review procedure that does not allow a court to determine whether, and to what extent, the detention before it is based on statements extracted by torture or other impermissible coercion when the court rules on the legality of that detention ignores the lessons of history, taints the federal judiciary, and provides an inadequate substitute for the common law writ of habeas corpus.

A. Common Law Courts And Our Founding Fathers Denounced Torture As Illegal And Refused To Rely Upon Statements Extracted By Torture Or Other Impermissible Coercion

1. Torture has been illegal under English common law for more than 350 years

a. More than a millennium ago, torture was allowed in England in trials by ordeal, which required the accused to submit to various painful tests, to decide questions of guilt and civil liability. *See* A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 220, 221-222 (1897). The use of such torture tactics—often involving fire or water—was not based on any theory that such methods would lead to reliable statements, but rather on the belief that God would intervene to disclose the truth. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 4 (1978).

Torture was abandoned as part of the truth-seeking function in England in 1215, when trial by jury was introduced. Indeed, England prided itself at that time on its rejection of the legal system adopted by continental Europe, which incorporated torture of criminal defendants as a systemic element of its legal machinery. *See* John H. Langbein, *Torture and The Law of Proof* 73 (1976). In the late 1400s, for example, Chief Justice Fortescue of the King's Bench emphasized that the torture conducted in Europe, but rejected in England, yielded unreliable results

and thus did "its utmost to condemn the innocent and convict the judge of cruelty." John Fortescue, *De Laudibus Legum Angliae, A Treatise in Commendation of the Laws of England* 73 (Francis Gregor, trans., Cincinnati, Robert Clarke & Co. 1874) (c. 1460-1470).

b. The use of torture had one, relatively brief, resurgence in England between 1540 and 1640, a period during which the notorious Star Chamber operated. *See* Langbein, *supra*, 79, 81. The Star Chamber supplemented the proceedings of the common law and equity courts in both civil and criminal matters and placed a premium on speed and flexibility. *See* 5 William S. Holdsworth, *A History of English Law* 156, 165 (1924). In criminal matters, the Star Chamber considered itself "free to disregard not only the ordinary rules of procedure, but also the ordinary rules of law," and, consequently, "torture was freely used, to extort either a confession, or the disclosure of further information." 5 Holdsworth, *supra*, at 184-185; *see* Lowell, *supra*, at 290.

Even during the height of the Star Chamber, however, torture was used relatively rarely by that body (and not at all by the common law courts). Torture was authorized only by special warrants issued by the King or his Privy Council, *see* Lowell, *supra*, at 293, and such warrants were issued in only eighty-one cases. *See* Langbein, *supra*, at 81; *see also* David Jardine, *A Reading on the Use of Torture in the Criminal Law of England* 73-109 (London, Baldwin and Cradock 1837) (collecting many of the warrants).[3] The

[3] Although the records of the warrants are incomplete, these eighty-one cases likely do "not drastically understate the total" number because torture "remained a very exceptional practice of the highest central authorities." Langbein, *supra*, at 82. The warrants typically authorized torture by rack or manacle, but could also include other coercion such as inhumane cells or extended deprivation of necessities. *See, e.g.*, Jardine, *supra*, at 79-80 (Sherwood Warrant) (accused committed to the "dungeon amongst the ratts"); *id.* at 82 (Humfrey Warrant) (authorizing "some slight kinde of torture, such as may not touch the losse of any lymbe, as by whipping"); *id.* at 31-32, 39 (Briant Warrant) (in addition to "the ordinary torture," authorizing "torture by

(Continued on following page)

most frequent victims of torture, by far, were those accused of political and religious wrongdoing, *see* Langbein, *supra*, at 88, 94-122, particularly those suspected of offenses against the State. *See* Lowell, *supra*, at 294-295.[4]

By the end of the Star Chamber period, common law courts declared that torture was unlawful and, in fact, regarded the preceding era as an improper exercise of royal prerogatives. Torture was clearly denounced as contrary to English law in the mid-to-late 1600s, some 350 years ago.

c. The precise explanation for the decline and ultimate cessation of torture in England is a matter of historical debate. Some attribute it to "the great constitutional struggle and civil war which made the government subject to the law" and prompted Parliament to abolish the Star Chamber. *A(FC) v. Secretary of State for the Home Department*, [2005] UKHL 71, at 53 ¶83, [2006] 2 A.C. 221 (appeal taken from Eng.) (Hoffman, L.); *see* An Act for the Regulating of the Privy Council, and for

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famine," during which the individual "was reduced to such extremities that he ate the clay out of the walls of his prison, and drank the droppings of the roof"); James Heath, *Torture and English Law* 190, 219 (1982) (Beesley and Humberson Warrant) (authorizing use of the "Little Ease," a small cell in which a man could not stand erect).

[4] In these instances, torture was most likely used to discover information about whom to investigate as possible accomplices, to quash threatened sedition, and to investigate felonies in which the victim had strong political connections. Torture was not viewed, even then, as a tactic that would directly yield reliable evidence for trial. *See* Langbein, *supra*, at 89-90, 136-137; Francis Bacon, *Certain Considerations, Touching the Better Pacification and Edification of the Church of England* (1604), *reprinted in* 2 Basil Montagu, *The Works of Francis Bacon, Lord Chancellor of England* 425 (Philadelphia, A. Hart 1850) ("torture is used for discovery, and not for evidence"). One popular commentator explained at the end of the 19th Century that he was not "aware of any single instance, even in the worst years of tyranny and prerogative, * * * when confessions obtained by the rack have been used for the conviction of accused persons." Frederick Andrew Inderwick, *The King's Peace: A Historical Sketch of the English Law Courts* 88-89 (London, Swan Sonnenschein & Co. Ltd. 1895) (footnote omitted).

taking away the Court commonly called the Star-Chamber (Habeaus Corpus Act), 1640, 16 Car. I, c. 10 § 3 (Eng.). At that same time, Parliament enacted legislation that is viewed as the predecessor of the Fifth Amendment's privilege against self-incrimination. *See* A Repeal of a Branch of a Statute *primo Elizabeth,* Concerning Commissioners for Causes Ecclesiastical, 1640, 16 Car. I, c. 11 § 4 (Eng.) (prohibiting ecclesiastical courts from requiring a person, under oath to "confess or to accuse himself or herself or any Crime * * * or any Neglect, Matter or Thing, whereby or by reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever"); John H. Wigmore, *The Privilege Against Self-Crimination: Its History*, 15 HARV. L. REV. 610, 633-635 (1902). These two Acts are appropriately viewed as a clear rejection of reliance on testimony extracted by torture or even lesser forms of compulsion.[5]

Other historians mark the turning point for the decline of torture to be a bit earlier, in the judicial consensus evidenced in *Felton's* case in 1628. *See R v. Felton,* (1628) 3 Howell's State Trials 369, 371. In that case, John Felton was accused of assassinating the Duke of Buckingham. One of the councilors employed to examine Felton threatened him with the rack unless he divulged the names of his accomplices. *Ibid.* The council then debated "whether by the law of the land they could justify the putting him to the rack," and King Charles I asked the common law judges whether it was legal to impose such torture. *Ibid.* The judges unanimously agreed that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our

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[5] The Act that abolished the Star Chamber also provided for judicial review of the legality of the Star Chamber's detentions. The Act stated that "any Person" imprisoned by order of the Star Chamber, King, or Council should have habeas corpus and be brought before the court "without delay" with the cause of imprisonment shown and determined whether "just and legal." Habeaus Corpus Act, *supra*, § 8.

law." *Ibid.*; *accord* James Heath, *Torture and English Law,* 162-164 (1982) (quoting Bulstrode Whitelocke the Elder's similar contemporaneous account of the decision in Felton's case).

Although some modern academics question the scope and accuracy of the report in *Felton*'s case, it was clearly understood in the late eighteenth century to express a definitive common law prohibition of torture. In reflecting on *Felton's* case, Blackstone stated in 1769 that a rack for torture "still remains in the tower of London: where it was occasionally used as an engine of state," but, he noted, the device was "not of law." William Blackstone, 4 *Commentaries* *326 (spelling modernized; footnotes omitted). *Accord* 2 Howell's State Trials 774 n.(a) (commentary added in 1775 by Francis Hargrave to fourth edition citing *Felton's* case for the proposition that torture was unlawful). Blackstone also praised the judges in *Felton's* case, noting that they had "declared unanimously, *to their own honour and the honour of the English law*, that no such proceeding was allowable by the laws of England." *Ibid.*; *see also* Leonard MacNally, *The Rules of Evidence of Pleas on the Crown* 278 (London, J. Butterworth 1802) (discussing *Felton's* case, "to the honour of the law, and of themselves, [the judges] unanimously resolved, that the *rack* cannot be legally used") (spelling modernized).

Moreover, writings by Sir Edward Coke contemporaneous to *Felton's* case reflected the same condemnation of torture as unlawful. In his *Second* and *Third Part of the Institutes of the Laws of England*, the manuscripts of which were prepared by Coke between 1629 and 1634, *see* 1 Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke* lxv (2003), Coke asserted that to "put [a man] to torture" was contrary to the Magna Carta insofar as it would violate the prohibition on any freeman being in "any [way] otherwise destroyed" unless by lawful judgment or by law of the land. Edward Coke, *Second Part of the Institutes of the Laws of England* 48 (1642); Edward Coke, *Third Part of the Institutes of the Laws of England* 35 (1644). In his Third *Institutes*, Coke declared that "there is no law to warrant tortures in this land" and

"there is no one opinion in our books, or judicial record (that we have seen and remember) for the maintenance of tortures & torments." *Ibid.* (spelling modernized).[6]

These denunciations by preeminent jurists, together with the undisputed fact that the authorized use of torture ceased in England by the mid-1640s point to one conclusion: "that the Common Law, however ill-defined in some areas, did condemn interrogatory torture in any context, whether Executive, judicial (although outside its own process), or quasi-judicial." Heath, *supra,* at 178.

Now is not the time to abandon this 350-year-old doctrine.

2. Common law courts did not admit statements extracted by torture or other inhumane treatment to support determinations of guilt because of the inherent unreliability of such statements and because the cruelty of torture corrupts the judicial function

a. Even during the anomalous Star Chamber period, the weight of historical evidence indicates that statements extracted by torture or other inhumane treatment were not used against defendants in English common law courts. For example, a statute enacted in 1552 provided that a single confession was sufficient to prove the crime of treason, which normally required the testimony of two witnesses, but only if the confession was made "willingly without Violence." An Act for the Punishment of divers

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[6] Because Coke had, earlier in his career, signed warrants authorizing torture, Coke's denouncement of torture in his *Institutes* appears to reflect an evolution of his thinking on the issue. One scholar suggests that Coke's views changed "when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject." 5 Holdsworth, *supra*, at 194. The *Institutes* thus reflected Coke's final conclusion that torture "always had been illegal by the common law, and the authority under which it had been supposed to be legalised he now denied." *Ibid.* (footnotes omitted).

kinds of Treasons, 1551, 5 & 6 Edw. VI, c. 11, §§ 9, 12. That restriction on the use of confessions only if voluntary and "*without violence*" was an express response to the fact that torture was used during the Star Chamber era even though the practice was "*against law*." Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases: To Which Are Added Discourses upon a Few Branches of the Crown Law* 244 (2d ed. corrected, London, W. Strahan & M. Woodfall 1776) (spelling modernized).

b. The common law courts also subsequently adopted rules of evidence that expressly prohibited use against defendants of testimony extracted by torture, inhumane treatment, or other, lesser forms of coercion. The courts did so because coerced testimony is inherently unreliable, because of the "cruelty of the practice as applied to those" determined to be innocent, and because of "the belief that it degraded all those who lent themselves to the practice." *A(FC)*, [2005] UKHL 71, at 6 ¶11 (Bingham, L.).

Sir Matthew Hale's *Pleas of the Crown* stated that, in order for a defendant's confession made prior to trial to be admissible at trial "it must be testified that he did [the confession] freely, without any menace or undue terror imposed upon him." 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 284 (1736), quoted in *Bram v. United States*, 168 U.S. 532, 546 (1897). Likewise, Lord Chief Baron Gilbert stated in 1760 that "this confession must be voluntary, and without compulsion; for our law in this differs from the civil law; that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on." Baron Gilbert, *The Law of Evidence* 139 (2d ed. 1760), quoted in *Bram*, 168 U.S. at 546.

Thus, well before the American Revolution, it was settled in the common law that, when persons make

"confessions under threats or promises," then "frequently * * * such examinations and confessions have not been made use of against them on their trial." *The King v. Rudd*, (1775) 168 Eng. Rep. 160, 161 (K.B.); *see The King v. Warickshall*, (1783) 168 Eng. Rep. 234, 235 (K.B.) ("no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear" and it "cannot be received in evidence").[7]

This rule derived in part from the unreliability of statements induced by threats or promises whereby innocent defendants were punished. *See Warickshall*, 168 Eng. Rep. at 235 n.1 (discussing *Perry's Case*, (1660) 14 Howell's State Trials 1312, in which a man "under a promise of pardon, confessed himself guilty of" the murder of Mr. Harrison and was executed and yet "a few years afterwards it appeared that Mr. Harrison was alive"); Theodore Barlow, *The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate* 189 (London, Lintot 1745) (claiming torture is not only "cruel" but "at the same Time uncertain, as being rather Trials of the Strength and Hardiness of the Sufferer, than any Proof of the Truth").

The rule was also adopted because experience demonstrated that "confessions extorted from the fear of death [or], the infliction of torture * * * so far from accelerating and clearing, impedes and fouls the current of justice." MacNally, *supra,* 44; *accord A(FC)*, [2005] UKHL 71, at 52 ¶82 (Hoffman, L.) (torture "corrupts and degrades * * * the legal system which accepts it"); *id.* at 80 ¶150 (Carswell, L.) (allowing admission of such evidence

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[7] *See also* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1198 n.147 (1996) (collecting cases from the 1770s in the Old Bailey and at York assizes that excluded confessions); Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 328-329 (1968) (collecting additional examples from England prior to the American Revolution).

would "degrade the [judicial] proceedings and involve the state in moral defilement").

3. Our Founding Fathers shared the common law's rejection of torture and the Bill of Rights demonstrates their disavowal of even lesser forms of coercion

The Founding Fathers embraced the English common law's rejection of torture and other impermissible coercion, which they viewed as a tool of royal despotism. *See* Seth F. Kreimer, *Too Close To The Rack And The Screw: Constitutional Constraints On Torture In The War On Terror*, 6 U. PA. J. CONST. L. 278, 312 (2003). The notion "that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime" was "well known to those who established the American government." *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). In fact, such principles were "branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber." *Ibid.*; *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1681 (2005) (the prohibition against torture "is not just one rule among others, but a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system").

a. The debates surrounding the adoption of the Constitution demonstrate that the historical lessons drawn by the Founding Fathers about the Star Chamber, and its use of torture, underlay many of the provisions of the Bill of Rights. Most clearly, the Fifth Amendment was the Founders' response to the Star Chamber. "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chambers proceedings occurring

several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

In the ratification debates in Virginia, Patrick Henry observed that the distinguishing feature of America's common-law ancestors was that "they would not admit of tortures, or cruel and barbarous punishment." 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447-448 (2d ed., Philadelphia, J.B. Lippincott Co. 1891). Henry noted that, absent a bill of rights, the new Congress might point to "the practice of civil law [in France, Spain, and Germany]" and assert that "there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture." *Id.* at 447-448. In arguing for the inclusion of a bill of rights during the constitutional conventions, other delegates expressly reflected on the horrors of the Star Chamber and railed against "the potentially oppressive use of the criminal justice system by the new federal government." Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *The Privilege Against Self Incrimination: Its Origins and Development* 109, 137 (Richard H. Helmholz ed., 1997).

George Nicholas argued in the Virginia ratification debates, in opposition to Patrick Henry, that no bill of rights was necessary because Virginia's Declaration of Rights, adopted in 1776, did not prohibit torture and yet no one had been tortured in Virginia. *See* 3 Elliot, *supra*, at 451. Nicholas was later forced to admit his error after George Mason, who was the principal author of the Declaration of Rights, responded that "the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture," because "one clause expressly provided that no man can give evidence against himself," in contrast to "those countries" where "torture is used" to "extort[]" evidence "from the criminal himself." *Id.* at 452.

James Madison drew from the language of the Virginia provision discussed by George Mason in proposing what is now the Fifth Amendment's Self-Incrimination

Clause. *See United States v. Hubbell*, 530 U.S. 27, 52-53 (2000) (Thomas, J., concurring). The provision was understood in part as "a ban on torture and a security for the criminally accused." Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* 430 (1968); *see* Akil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 927 (1995) ("The Founding-era history of the self-incrimination slogan in America was bound up with concerns about torture."). But those were not its only functions. *See* Levy, *supra*, at 430. The "rack in the Tower" was simply "the emblem of the need for a guarantee against coerced confession." Moglen, *supra*, at 137. The Fifth Amendment was also intended to prohibit "improper methods of interrogation," such as "incriminating interrogation under oath." Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in Helmholz, *supra*, 181, 185, 192.

Other provisions of the Bill of Rights also reflect the Founding Fathers' antipathy toward torture and impermissible coercion within the justice system. For example, the Eighth Amendment's cruel and unusual punishments prohibition was enacted "as an admonition to all departments of the national government" to "warn * * * against such violent proceedings as had taken place in England." 3 Joseph Story, *Commentaries on the Constitution of the United States* 750-751 (Boston, Hilliar, Gray & Co. 1833); *see Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned * * * with proscribing 'tortures' and other 'barbarous' methods of punishment.") (citation omitted). Scholars also believe that the "root antitorture idea" is largely a Fourth Amendment concept. Amar & Lettow, *supra*, at 927.

Furthermore, it has long been recognized that "our country * * * wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed" as

an "assurance against ancient evils." *Chambers v. Florida*, 309 U.S. 227, 237 (1940); *cf. Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part) ("[U]se of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person.").

b. The Founders apparently were motivated by the same concern about unreliability that was at the root of the torture prohibition at English common law. Those who drafted our Constitution knew full well that English courts at that time refused to rely upon coerced confessions at trial because they were not reliable. *See* Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 224 (1998). American common law courts in the years immediately following the ratification of the Bill of Rights followed the same path. *See, e.g.*, *People v. Rankin*, 2 Wheeler Crim. Cas. 467, 469 (N.Y. Oyer & Term. 1807) (excluding a confession obtained through the threat "if you do not tell all you know about the [poisoning], you will be put in the dark room and hanged" with a note from the reporter, Jacob Wheeler, explaining that "it is impossible to say whether a confession, induced by these means, is not made rather from a motive of fear or interest, than from a sense of guilt"); *State v. Hobbs,* 2 Tyl. *382, *382-*383 (Vt. 1803) (dictum) (state constitutional prohibition of compulsory self-incrimination prohibited torture and made a torture-induced confession inadmissible because of its doubtful reliability).

The Founders' aversion to torture and other impermissible coercion was also rooted in the uniquely American desire to protect the delicate balance of power between the individual and the new government, which was, after all, the very purpose of the constitutional structures that they labored mightily to craft. Because state-sponsored torture "is the antithesis of the legitimate relation between the state and those subject to its power," Kreimer, *supra*, at 298, coercive criminal justice tactics would undermine the new Republic's fragile recognition of individual liberty like few other practices then known. *Cf.*

Story, *supra*, at 751 (crediting Blackstone with "wisely" recognizing that "sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution"); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (recognizing that totalitarian regimes employ "unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical and mental torture," but "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government").

In sum, the Founders were well acquainted with the descendants of those who had suffered at the hands of the Kings and inquisitors and, without doubt, understood the connection between torture and tyranny. *See Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses."); *see also* Moglen, *supra*, at 133-134 (by "treat[ing] elements of common law criminal procedure as fundamental law," the Framers "sought to protect their practices against tyrannical innovations").

B. The CSRT Panels Routinely Upheld Government Detention Of Individuals As Enemy Combatants Without Determining Whether Statements On Which They Relied Were Extracted By Torture Or Other Impermissible Coercion

Despite the longstanding and well-established condemnation of statements extracted by torture or other improper coercion that is clearly reflected in Anglo-American legal history and tradition, recurring and substantial allegations about reliance by the CSRT panels on statements extracted by such methods now cast a disturbing shadow over judicial review of the CSRT detention determinations. Reports by the government itself, as well as by others, indicate that abusive

interrogations occurred at Guantanamo and elsewhere.[8] And the CSRT panels made their detention determinations without regard to how incriminatory statements were obtained.

Amici are not in a position to evaluate the veracity of the detainees' accounts, nor do we attempt here to distinguish between torture and other impermissible coercion. We maintain, however, that under the circumstances presented here and described below, the judicial review authorized by the Detainee Treatment Act is not an adequate substitute for the common law writ of habeas corpus because it does not appear to allow the reviewing court, when it rules on the legality of the detention, to engage in the factfinding necessary to reach an accurate determination of the extent to which the CSRT panel relied on statements extracted by unacceptable and impermissible means.

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[8] *See, e.g.*, Federal Bureau of Investigation, *Detainee Positive Responses*, at Responses 10, http://foia.fbi.gov/guantanamo/detainees.pdf (an anonymous FBI agent reports entering interview rooms where the detainee had been "chained hand and foot in a fetal position to the floor, with no chair, food, or water * * * for 18, 24 hours or more. * * * On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night."); *see also id.* at Responses 11-15, 62, 63; Department of Defense, *Army Regulation 15-6: Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* 63 (Aug. 2004), http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf; Human Rights Watch, *Guantanamo: Detainee Accounts*, at 12 (2004), http://hrw.org/backgrounder/usa/gitmo1004/gitmo1004.pdf (describing interrogation techniques that led detainees to falsely confess to being with Osama bin Laden in Afghanistan at a time when they were actually in England). *See also* Jane Mayer, *The Black Sites, A Rare Look Inside the CIA's Secret Interrogation Program*, THE NEW YORKER, Aug. 13, 2007, at 49 (describing report of International Committee of the Red Cross).

1. The CSRT panels did not investigate or exclude statements allegedly extracted through the torture or coercion of the detainee under review

a. The rules that govern the CSRT, which were promulgated by the Navy after the establishment of the CSRT by the Department of Defense established the CSRT in July 2004, stated that "a panel of three neutral commissioned officers" would determine in the context of "a non-adversarial proceeding," whether DOD had properly classified each detainee as an "enemy combatant." Memorandum from Secretary of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba*, Enc. 1 (CSRT Rules) at 1 (¶¶ B, C(1)) (July 29, 2004).[9] The CSRT Rules make clear that a CSRT panel "is not bound by the rules of evidence such as would apply in a court of law." *Id.* at 6 (¶ G(7)). Rather, the panel is allowed to consider all "reasonably available" information that, in its own view, is "relevant and helpful" to its decision. *Id.* at 3, 4, 6 (¶¶ E(2), E(3), F(6), G(7)). Moreover, there is a "rebuttable presumption" that evidence against a detainee in the "possession of the U.S. government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant" is "genuine and accurate." *Id.* at 3, 6 (¶¶ E(3), G(11)). By contrast, exculpatory evidence, even if submitted to a CSRT panel by the government, is not entitled to the same presumption. *See id.* at 7 (¶ H(4)).[10]

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[9] http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

[10] These CSRT Rules governed the petitioners' CSRT proceedings. When Congress subsequently enacted the DTA, it directed the Department of Defense to establish new rules to ensure that future CSRT panels "to the extent practicable, assess—(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." DTA at § 1005(b)(1). The rule promulgated pursuant to that directive, which has no effect on the instant case, merely restates

(Continued on following page)

Since the implementation of the CSRT Rules, the government has consistently maintained that the CSRT panels were authorized to make detention determinations in reliance upon statements extracted by torture or other impermissible coercion. The Principal Deputy Associate Attorney General explained unequivocally to a district court that if "reliable" information "came to the CSRT's attention that was obtained through a non-traditional means, *even torture by a foreign power*," nothing "would prevent the CSRT from crediting that information for purposes of sustaining the enemy combatant class."[11]

According to the government, this is so even if, *arguendo*, the individual detainee has fully enforceable constitutional rights: "[T]o answer your Honor's question very clearly, if the CSRT were to determine that evidence of a questionable providence *[sic]*, the result of torture perhaps, was reliable, I don't think there is anything in the due process clause as it would pertain to these Petitioners that would prevent the evidence from being relied upon."[12]

b. The actions of the CSRT panels confirm that they, too, did not view the question whether statements presented by the government were extracted by torture or other impermissible means to be relevant to the question of whether they could rely on that evidence. Indeed, CSRT panels have upheld the detention of hundreds of individuals without any apparent regard for whether the information presented was extracted by torture as alleged.

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the statutory text without further elaboration or guidance. *See* Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba*, Enc. 10 (July 14, 2006), http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

[11] Tr. of Mot. Hr'g at 84:15-22, *Boumediene v. Bush*, No. 1:04-cv-1166 (D.D.C. Dec. 2, 2004) (emphasis added).

[12] *Id.* at 86:19-24.

For example, the unclassified evidence recounted by the Recorder at the CSRT proceeding of Mamdouh Habib consists entirely of alleged admissions by the detainee.[13] Mr. Habib's government-appointed personal representative—a non-lawyer appointed to each detainee—explained to the CSRT panel that Mr. Habib maintained that "all of the information" he previously provided "was given under duress and torture" in Pakistan and Egypt prior to his arrival at Guantanamo.[14] The CSRT panel simultaneously determined that the allegations of abuse were *credible enough to warrant investigation* and upheld Mr. Habib's detention as an enemy combatant.[15] Regrettably, Mr. Habib's case is not unique.[16]

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[13] Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #6, *available at Habib v. Bush*, No. 1:02-cv-01130-CKK, Dkt. No. 32, Exh. A at 9 (D.D.C. Oct. 6, 2004). According to Mr. Habib's habeas counsel, the evidence against Mr. Habib derived entirely from purported "confessions" he made after he was tortured for six months. http://www.law.northwestern.edu/macarthur/documents/guantanamo/Written_Testimony_of_J_Margulies.pdf, at 4.

[14] Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #6, *supra*, at 9. Mr. Habib's habeas counsel reported that Mr. Habib had informed him that was, *inter alia*, beaten, suspended from hooks on the wall, and kept in a room with an extremely low ceiling where he could only stoop and which the guards slowly filled with water. Decl. of Joseph Margulies dated Nov. 23, 2004, *available at Habib v. Bush*, Dkt. No. 1:02-cv-01130-CKK, Dkt. No. 83, Exh. 2 at ¶¶ 10-11 (D.D.C. Jan. 5, 2005); Aff. of Joseph Margulies dated April 27, 2005, *available at Habib v. Bush*, Dkt. No. 112 at ¶ 4 (D.D.C. Apr. 29, 2005). The State Department has long condemned the use of torture by state security agents in Egypt and Pakistan. *See, e.g.*, Department of State, *Country Reports on Human Rights Practices—2006* (Mar. 6, 2007) http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm (Egypt); http:www.state.gov/g/drl/rls/hrrpt/2006/78874.htm (Pakistan).

[15] *Id.* at 11. Mr. Habib has since been released and is living in Australia.

[16] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #20, *available at Tumani v. Bush*, No. 1:05-cv-00526-RMU, Dkt. No. 13, Exh. 2 at 9 (D.D.C. Aug. 18, 2005) (referring torture allegations for investigation while simultaneously upholding continued detention).

In another specific instance, the CSRT panel apparently relied upon a videotape made by the Taliban in which the detainee, Abdul Rahim Al Ginco, volunteered to be a "suicide martyr."[17] Mr. Ginco, who had been imprisoned by the Taliban from May 2000 to January 2002, explained that the confession on the video, in which he also claimed to have been a spy for the United States, was coerced and made in response to three months of torture by the Taliban.[18] He also explained that his alleged association with an alleged al Qaida weapons specialist took place in the Taliban prison: "They beat me and tortured me[.] I couldn't handle it, and [I] told them he's with me, that we are both American spies."[19] Nonetheless, although it appears that Mr. Ginco had been imprisoned by the Taliban from well before September 11, 2001, to the time the Taliban regime collapsed, the CSRT panel upheld the government's detention of Mr. Ginco as an enemy combatant.[20]

An analysis of recently released CSRT transcripts and documents found that 18% of the Guantanamo detainees alleged torture, but the available record does not indicate that the CSRT panels resolved allegations of torture before

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[17] Summarized Unsworn Detainee Statement (Unclassified/FOUO) ("Ginco Statement"), ISN #489, at 3629, http://www.dod.mil/pubs/foi/detainees/csrt/set_51_3490-3642_Revised.pdf at 3620-33. *See also* Tim Golden, *Expecting U.S. Help, Sent to Guantanamo*, N.Y. TIMES, Oct. 15, 2006, at 26; Carol D. Leonnig, *Coerced Confession Traps Detainee, Lawyers Say*, WASH. POST, Oct. 14, 2006, at A17.

[18] *Ibid.* Mr. Ginco reported that the Taliban subjected him to beatings, electric shock, being hung from the ceiling, water torture, striking the bottom of his feet with clubs, and sleep deprivation. Mot. for Partial Summ. J. at 8-9, *Ginco v. Bush*, No. 05-cv-1310-RJL (D.D.C. Oct. 10, 2006).

[19] Ginco Statement, *supra*, at 3630.

[20] Mr. Ginco apparently is housed in the psychiatric ward, in part because other detainees believe he is a spy for the Americans. *Id.* at 3622.

upholding the detention of such individuals.[21] Rather, "in each case, the panel proceeded to decide the case before any investigation was undertaken." Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings,* Seton Hall Public Law Research Paper No. 951245, at 36 (Dec. 2006), http://ssrn.com/abstract=951245.

2. A detainee had no means of knowing when a CSRT panel relied on statements extracted from others by impermissible coercion

Even more difficult procedural problems are manifest in a case where, unbeknownst to the detainee, a third party was allegedly tortured or otherwise subjected to inhumane treatment and incriminated the detainee as a result. Because the CSRT panels often relied on classified information, it is impossible for *amici* to know how many times a CSRT panel upheld the detention of an individual as an enemy combatant in reliance on such evidence, and, of course, a detainee in custody at Guantanamo who must represent himself without counsel before a CSRT panel is at even a worse disadvantage in terms of access to information.

Consider, for example, the Department of Defense statement that the interrogation of detainee Mohammed al Qahtani produced "detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantanamo."[22] According to an interrogation log obtained by a journalist, Mr. al Qahtani was subjected to questioning for approximately 20 hours per day for seven weeks after his arrival at Guantanamo, during which period he was kept in isolation, and subjected to sleep and sensory deprivation

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[21] *Amici* do not have access to the classified evidence presented in any individual case.

[22] Department of Defense, *Guantanamo Provides Valuable Intelligence Information* (June 12, 2005), http://www.defenselink.mil/releases/2005/nr20050612-3661.html.

and other abuses.[23] Under standard CSRT procedures, the 30 men whom Mr. al Qahtani accused would never be told who was the source of the statement that they were Osama Bin Laden's bodyguards or under what circumstances the accusation had been extracted, and Mr. al Qahtani's statements would be presumed genuine and accurate.

This concern is not hypothetical. The available CSRT record for Faruq Ali Ahmed, for example, does not contain any allegations of abusive interrogation, and indicates that the detainee was not informed of the source of the allegations against him.[24] The fortuitous publication of the interrogation log enabled Mr. Faruq's habeas counsel to determine that the source of the allegations against Mr. Faruq had been a detainee who was "abused and coerced into making statements inculpating other men."[25]

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[23] Department of Defense, *Interrogation Log, Detainee 063* (Nov. 23, 2002 to Jan. 11, 2003), at 27, www.time.com/time/2006/log/log.pdf. The FBI reported that Mr. al Qahtani's treatment left him "evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)." Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI, to Major General Donald J. Ryder, Department of the Army, Criminal Investigation Command, at 2, ¶ 3 (July 14, 2004), *attached to* Letter from Marc D. Falkoff, Covington & Burling, to Administrative Review Board, Guantanamo Bay Naval Station regarding Faruq Ali Ahmed (Feb. 5, 2005) (on file with author).

[24] Decl. of James R. Crisfield, *available at Abdah v. Bush*, Dkt. No. 1:04-cv-1254-HKK, Dkt. No. 30, Exh. A at final page (D.D.C. Oct. 12, 2004) (attaching record). Mr. Faruq's personal representative at the CSRT took the unusual step of labeling part of the evidence implicating Mr. Faroq as "unreliable" on the grounds that it was derived from an informant who "has lied about other detainees to receive preferable treatment." There is no indication that he realized that other evidence had been derived from the coercive interrogation of another detainee. *Ibid.* The CSRT nonetheless upheld Mr. Faruq's detention as an enemy combatant.

[25] Letter from Falkoff, *supra*, at 3; *see also* Letter from Robert Knowles, Covington & Burling, to Administrative Review Board, Guantanamo Bay Naval Station regarding Sadeq Mohammed Said

(Continued on following page)

Even when detainees suspected that the accusations against them resulted from the torture of another detainee, it was impossible for them to prove it. For example, Ibrahim Zidan told the CSRT that he believed another person—Anwar Abu Faris—had made false statements about Zidan receiving training in Afghanistan because Faris had been rendered to Jordan and tortured.[26] The publicly available record of Mr. Zidan's CSRT proceeding does not indicate any effort by the CSRT to determine the truth of this allegation.

3. The CSRT record is woefully incomplete regarding the accuracy of allegations of torture or other coercion

As described above, even when the CSRT panels were aware of substantial allegations that statements used against detainees had been extracted by torture or other impermissible coercion, those allegations appear to have had no effect on the panels' decisions regarding whether those individuals were properly detained. The CSRT's failure to question the reliability of the evidence allegedly extracted by torture might be attributable to the government's view that it is not the CSRT's role to investigate allegations of abuse.[27]

That result might also be explained, at least in part, by the fact that CSRT panels might not have been provided with information that would enable them to evaluate whether statements had been extracted by

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Ismail, at 1-2 (June 3, 2005) (on file with author). As a detainee, Mr. Faruq himself is not permitted access to news publications.

[26] Summarized Sworn Detainee Statement (Unclassified/FOUO) ISN #761, at 1175-1176 http://www.dod.mil/pubs/foi/detainees/csrt/set_11_1145-1178.pdf. The State Department has reported on the use of torture to obtain confessions in Jordanian prisons. *See* Department of State, *Country Reports on Human Rights Practices—2006* (Mar. 6, 2007) at §1c, http://www.state.gov/g/drl/rls/hrrpt/2006/78855.htm (Jordan).

[27] Tr. of Mot. Hr'g, *supra*, at 85:20.

torture, even if they had been inclined to do so. Lieutenant Colonel Stephen Abraham of the U.S. Army Reserve, who was assigned to the Office for Administrative Review of the Detention of Enemy Combatants from September 11, 2004 to March 6, 2005 (the time period in which most of petitioners' CSRT proceedings were held) recently testified before Congress that a CSRT panel "would not be advised as to whether information [it received from the government] had been provided under duress." *Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the House Armed Services Comm.*, 110th Cong. (July 26, 2007).[28]

Lieutenant Colonel Abraham further testified that a CSRT panel was given only "distilled summaries" of information about a detainee gathered from intelligence agencies and prepared for the panel by "case writers." *Id.* at 6. And he explained that "a summarized document might say that a detainee 'is a member of Al Qaeda' but would not include any information about * * * whether the source was paid for the information, [or] whether the source was detained or subjected to coercive interrogation techniques." *Ibid.*

The gap between the information provided to the CSRT panels and the facts relating to the coercive circumstances under which statements may have been obtained could not be filled by the detainee himself. Detainees were permitted only to hear an unclassified summary of the evidence—a summary that the CSRT itself described as "conclusory."[29] The detainee was unassisted by counsel, and could neither examine the classified evidence against him nor conduct independent factfinding. Consequently, the detainee could not develop a

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[28] Prepared statement of Lt. Col. Stephen E. Abraham, at 7, http://armedservices.house.gov/pdfs/FC072607/Abraham_Testimony072607.pdf.

[29] *See, e.g.*, Unclassified Summary of Basis for Tribunal Decision, Tribunal Panel #20, *supra*, at 8; *see also* Denbeaux, *supra*, at 1, 19.

record to challenge the provenance or reliability of any accusation.[30]

C. The DTA Does Not Appear To Authorize A Court To Engage In The Factfinding Necessary To Rule On The Legality Of The Executive Detention And, As Such, Is An Inadequate Substitute For The Common Law Writ Of Habeas Corpus

The Detainee Treatment Act (DTA) authorizes the United States Court of Appeals for the District of Columbia Circuit to "determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." Pub. L. No. 109-148, tit. X, § 1005(e)(2)(A), 119 Stat. 2680, 2739 (2005). Unlike other statutes that address the authority of federal courts to assess whether an individual is properly detained in government custody, however, the DTA does not purport to authorize a court to hear and determine the underlying facts. *Compare* 28 U.S.C. § 2243 (federal habeas statute providing that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require").

As such, the DTA does not appear to permit an adequate inquiry into whether inculpatory statements are unreliable because extracted by torture or other impermissible coercion, an inquiry that is essential to a meaningful judicial review of the validity of a CSRT detention determination, particularly under the circumstances presented here. CSRT panels chronically failed to identify and root out evidence extracted by torture or other impermissible coercion as detailed above, and the system provides no meaningful opportunity for the detainee himself to make such a record. Thus, there can be no assurance that the record presented to the court of appeals will provide the information necessary to enable it to assess whether, and to what extent, the detainee's

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[30] Denbeaux, *supra*, at 2, 24-33.

detention is based upon such evidence. This is so no matter how broadly the "record" is defined. *Cf. Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

Consequently, the court of appeals would be unable to make a meaningful decision about the legality of the detention. Instead, the court would be forced to rule without having before it the judicial factfinding necessary to make an accurate assessment of the circumstances under which the challenged evidence was obtained. (Upon further review of such a case, *this* Court would be placed in a similarly untenable position.)

As documented at the outset of this brief, common law courts would have refused to rely upon statements extracted by torture or other forms of inhumane treatment because such evidence is inherently unreliable, because torture is contrary to human dignity, and because the judiciary has never condoned such abhorrent practices nor allowed the judicial process to be corrupted by them. Ordinarily, federal courts would have the power to vindicate these values by conducting a probing inquiry into the factual and legal bases for a detention by the government. *See* 28 U.S.C. § 2243; *Boumediene v. Bush*, 476 F.3d 981, 1009 (D.C. Cir. 2007) (Rogers J., dissenting) ("Throughout history, courts reviewing the Executive detention of prisoners have engaged in searching factual review of the Executive's claims."). Forcing judges to proceed to adjudicate the validity of an Executive detention without such inquiry and based on statements extracted by torture or other impermissible coercion contravenes legal history and degrades the legal system. It is also a clearly inadequate substitute for the common law writ of habeas corpus.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the court of appeals and remand the cases for further proceedings.

Respectfully submitted,

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